CORRESPONDENCE.

EXPRESS PAROL TRUST, OR RESULTING TRUST?

Editor Virginia Law Register:

In *Miller* v. *Miller*, 99 Va. 125, the court decided that where the parties had made an express parol agreement to buy a parcel of land together, each to be interested in the land in proportion to the amount paid for the same, which was to be bid in at a judicial sale by one of the parties, in whose name the deed was taken, a trust resulted in favor of the other party in proportion to the amount paid by him in pursuance of such agreement.

The conclusion reached by the court is clearly right. But what is the result? The court and reporter treated it as a *resulting* trust. A resulting trust is one which arises by operation of law from the presumed intention of the parties. *Borst* v. *Nalle*, 28 Gratt. 423, 434; 2 Minor's Inst. 218; 2 Pom. Eq. Jur. 1030, 1031; 1 Perry on Trusts, 26.

This trust did not arise by operation of law, because the court declares no less than three times that there was an agreement between the parties, which was clearly proven by parol evidence, and also that the money was paid in pursuance of such agreement. The trust was created by this parol agreement. It is to be noted that the statute of frauds (what part of it does not appear) was specially pleaded. Nor was it necessary to indulge in any *presumptions* of intention, for the parties had *expressed* their intention in this agreement.

So that the result is an *express* trust, created by a parol contract, proved by parol evidence, and enforced in Virginia. It follows that the celebrated *dictum* of Judge Moncure in *Sprinkle* v. *Hayworth*, 26 Gratt. 384, is overruled by the decision in *Miller* v. *Miller*, and this some time mooted question seems settled. See article on Parol Trusts, 7 VIRGINIA LAW REGISTER, 15. X.

GRATUITOUS PASSENGER—LIABILITY OF CARRIER.

Editor Virginia Law Register:

It is always interesting to observe how differently different courts apply the reasoning contained in decided cases to similar cases before them. This is illustrated by reading together the two recent cases of *Norfolk etc. Ry. Co.* v. *Tanner*, 8 Va. Law Reg. 182 (June, 1902, editorially approved, pp. 193–4), and *Duncan* v. *Maine Cent. R. Co.*, 113 Fed. 508 (U. S. C. C. Maine, Feby. 1902). Both Tanner and Duncan were injured while riding on gratuitous passes containing agreements releasing the carriers from liability for negligence. The Virginia court, having cited, together with certain text-writers, *Phila. etc. R. Co.* v. *Derby*, *N. Y. Cent. R. Co.* v. *Lockwood*, *Ry. Co.* v. *Stevens*, and others, and distinguishing *Balto etc. R. Co.* v. *Voight*, said: "We feel that we could rest with safety upon the law as stated by the text-writers and decisions which we have considered. . . ." Thus the court held that law to be that such contracts are void, as against public policy, irrespective of statute. The Federal court took exactly the opposite view, contending that there is nothing in those cases authorizing such a conclusion, and that the reasons given by the United States Supreme Court in denying the validity of such contracts between carriers

and passengers for hire, as Lockwood and Stevens were, do not apply to cases of purely gratuitous passengers, as Tanner and Duncan were. Judge Keith asks "Is the State solicitous only for the safety of those who pay their fare? How does the fact that the passenger is being transported for hire or as a mere gratuity interest or affect the State?" Judge Putnam says, p. 511: "Mr. Justice Shiras . . . states the principles which justify the courts in holding that, as between common carriers and their customers, there are certain rules of public policy which require apparent interference with freedom of contract. He refers to the importance which the law justly attaches to human life and personal safety, and he says that the second fundamental proposition relied on to nullify contracts to relieve common carriers from liability caused by negligence, is based on the position of advantage possessed by them over those who are compelled to deal with them. He thus refers to what underlies what we have cited from Mr. Justice Gray. The first topic to which he refers (that is the importance which the law attaches to human life and personal safety), he evidently does not regard as essential to the issue, because, in the very case before him, he, and the court in whose behalf he was speaking, rejected all such considerations." And on p. 513: "Moreover, if propositions of this character (*i. e.* the importance which the law attaches to human life forbidding that relaxation of care in the transportation of passengers which might be supposed to be induced by special stipulations relieving the carrier), could operate in behalf of the plaintiff, they would also have reached *R. Co.* v. *Voight*, and necessarily have compelled a different conclusion in that case, because they are in all respects as applicable there as here." And in holding that the gratuitous passenger Duncan did not come within the second fundamental proposition of public policy, announced by Mr. Justice Shiras, Judge Putnam said, p. 511: "Now, it is plain that the plaintiff was not, within the language of Mr. Justice Gray, a customer who had no real freedom of choice. It is also plain that, in the matter of the pass in question, he and the defendant stood on a footing of entire equality, and that neither had occasion to deal with the other except at his or its absolute option. It is also, in the same way, clear, to apply the language of Mr. Justice Shiras, that in the transaction before us the defendant had 'no position of advantage' over 'one who was compelled to deal' with it, and that the plaintiff is in no sense one who came within that class described by him as yielding exemptions extorted from customers by duress of circumstances."

Payne v. *Terre Haute etc. R. Co.* (Ind.), 60 N. E., 362, cited by the editor, as "maintaining the view adopted by the Virginia court," has been reversed by the Supreme Court of that State. See 11 Am. Neg. Rep. 205.

It may be pertinent to ask, at this point, why does a citizen forfeit his State's interest in his personal safety by accepting employment with a travelling circus, or the express service, or the Pullman service. While travelling on such business he is without doubt lawfully on the train, and he is carried for hire, and in the absence of a contract to the contrary the carrier is a liable to him as to a passenger (Hutch. Carr. secs. 563–4; *Chamberlain* v. *Pierson*, 31 C. C. A., 164; *N. & W. R. Co.* v. *Shott*, 92 Va. 34; *Brewer* v. *N. Y. etc. R. Co.*, 124 N. Y. 59), yet such contracts with those persons are universally upheld on the ground that the carriage of such persons is not one of the essential duties of a carrier, and that it may, as to them, become a private carrier by contract. Hutch. Carr. sec. 81; 5 Am. & Eng. Enc. Law, 623 (note); *Balto. etc. R. Co.* v. *Voight*, 176 U. S., 498; *Russell* v. *Pittsburgh etc. R. Co.*, 55 L. R. A. 253; *Pittsburg etc. R. Co.* v. *Mahoney*, 148 Ind. 196; *Pullman etc. Co.* v. *Mo. Pac. Ry. Co.* 115 U. S. 587. But may it not just as truly be said that a carrier is not a common carrier of passengers on freight trains, and that such carriage is not one of its essential duties? Yet if it undertakes to carry a passenger on a freight train it is as responsible to him as if he were on a passenger train. Hutch. Carr. sec. 538a; *So. Ry. Co.* v. *Dawson*, 98 Va. 577; *Cent. of Ga. Ry. Co.* v. *Lippman*, 110 Ga. 665, 50 L. R. A., 673. Nor can it relieve itself from this responsibility by contract, at least if he be a passenger for hire. *N. Y. Cent. R. Co.* v. *Lockwood*, 17 Wall. 357; *Cent. of Ga.* v. *Lippman*, *supra*.

Richmond, Va. GEORGE AINSLIE.